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IN THE

Supreme Court of the United States

RICHARD MILLER,
Petitioner,

No. v.

UNITED STATES OF AMERICA,
Respondent,

and

FENTON LEON BASH and SAMUEL B. WOODS,
Petitioners,

No. v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	9
Appendix A	App. 1
Appendix B	App. 12
Appendix C	App. 22
Appendix D	App. 23
Appendix E	App. 24
Appendix F	App. 25
Appendix G	App. 26
Appendix H	App. 27
Appendix I	App. 28

AUTHORITIES CITED

Statutes

	PAGE
Title 18 U.S.C. 659	8
Title 18 U.S.C. 1084	2, 6
Title 18 U.S.C. 1952	2, 3
Title 18 U.S.C. 1953	2, 6
Title 18 U.S.C. 2311	8
Title 18 U.S.C. 3651	3
Title 28 U.S.C. 1254	2
Burns Indiana Statutes, Vol. 4, Part 2, 10-2310	4, 7
Burns Indiana Statutes, Vol. 4, Part 2, 10-3039	8

Cases

Delaney v. U. S., CCA 1 (1952) 199 F. 2d 107	8
Morissette v. U. S. (1952) 342 U.S. 246, 72 S.Ct. 240	5, 7
Smith v. California (1959) 361 U.S. 147, 80 S.Ct. 215	8
Turf Center Inc. v. U. S., CCA 10 (1963) 325 F. 2d 793	6
U. S. v. Bash and Woods, 258 F. Supp. 807	2

Miscellaneous

Hall, Ignorance and Mistake in Criminal Law, 33 Indiana Law Journal, 1, 29	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled causes on June 9, 1967. This petition is filed and presented pursuant to Rule 46 of the Rules of the Supreme Court of the United States in that the respective petitioners herein are jointly interested in said judgment since the same question is involved in each of said causes.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana is reported in *U. S.* v. *Bash* and *Wood*, 258 F. Supp. 807 and is reproduced herein as petitioners' Appendix A.

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as petitioners' Appendix B.

JURISDICTION

The opinion and judgment of the Seventh Circuit Court of Appeals was filed and entered on June 9, 1967. A Petition for Rehearing was filed and entered on June 21, 1967. The Court of Appeals en banc denied the Petition for Rehearing on July 21, 1967, a copy of said order is included herein as petitioners' Appendix C. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals contravenes a ruling precedent of the Supreme Court of the United States.

2. Whether the opinion of the Court of Appeals constitutes such a departure from federal judicial procedure in the administration of criminal justice so as to require this Court to exercise its power of supervision.

STATUTES INVOLVED

The statutes involved are the construction and interpretation of Title 18 U.S.C. 1952, 1084, and 1953 as applied to these petitioners in the cases at bar. Section 1952 is set forth in petitioners' Appendix D. Section 1084 is set forth in petitioners' Appendix E. Section 1953 is set forth in petitioners' Appendix F.

STATEMENT

Petitioners were charged with violation of Title 18 U.S.C. Section 1952. Petitioner Miller was indicted separately on one count. Petitioners Bash and Woods were indicted jointly on a three count indictment. Bash and Woods were found guilty after trial by jury on two counts of the indictment on August 4, 1966. Miller was found guilty after trial by jury on the sole count of the indictment on July 20, 1966. Petitioners were sentenced on September 15, 1966, and each was sentenced to a term of imprisonment for five years and fined $5,000 and costs. Under the provisions of Title 18 U.S.C. Section 3651 the court directed that they serve six months and the remainder of said term to be on probation.

The factual situation in each of the cases was substantially identical. Each of the petitioners owned and operated a poolroom and each was engaged in the business of "pool-selling". This consisted of the sale of pool-tab tickets to patrons on a daily basis. The winning combination was decided by reference to baseball teams who scored the highest number of runs. Each of the petitioners had in his place of business a Western Union ticker tape facility which had been on the respective premises in each instance for more than twenty years. The result of baseball games were transmitted on the Western Union ticker tape emanating from a central office in Chicago, Illinois, and received at the local Western Union office in Gary, Indiana, and there repeated and relayed to the respective poolhalls of the petitioners. Each of the petitioners maintained a blackboard with the names of all of the baseball teams and as the results would come in on the ticker tape they would be posted on the blackboard.

There was testimony from which the jury could have found that the Western Union ticker tape facilitated the operation of the pool-selling activity which was admittedly in violation of Burns Indiana Statutes Volume 4, Part 2, 10-2310, which is reproduced herein as petitioner's Appendix G.

Each of the petitioners had federal gaming stamps. During the trial of each of the petitioners they testified that they did not know that the use of the Western Union ticker tape was or could be a violation of any federal law. They each testified that they knew the activity of pool-selling was in violation of the laws of the State of Indiana.

The trial court instructed the jury that the Government was not required to prove that petitioners specifically intended to violate a federal law; that instruction is reproduced herein as petitioners' Appendix H.

Petitioners tendered a number of instructions which would have permitted the jury to consider whether petitioners acted or failed to act because of ignorance of the law in determining whether or not the petitioners acted or failed to act with the required intent; that instruction is reproduced herein as petitioner's Appendix I.

REASONS FOR GRANTING THE WRIT

THE OPINION OF THE COURT OF APPEALS CONTRAVENES A RULING PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES.

In *Morissette* v. *U. S.*, (1952) 342 U.S. 246, 72 S.Ct. 240, this Court ruled that the giving of an instruction by the trial court on presumed intent and the refusal to allow counsel to argue to the jury whether the defendant acted with innocent intention constituted reversible error. This Court further held that even though Congress had omitted any express requirement of criminal intent the omission would not eliminate that element as an essential ingredient of the crime.

In *Morissette* the defendant was charged and convicted of violation of 18 U.S.C. 641, specifically of converting to his own use property of the United States. The defendant had been deer hunting on a sparsely settled Government tract of land. The Government had established a practice bombing range in the area. As a result of the activity of the Air Force spent bomb casings accumulated at various locations on the tract of land. The defendant salvaged some of these casings. There was no attempt to conceal the salvage operation. The pertinent part of the statute then read as follows: "Whoever embezzles, steals, purloins or knowingly converts . . ." Government property is punishable by fine and imprisonment. It was in this context that this Court ruled that the instruction on presumed intent was erroneous.

The pertinent part of the statute under which petitioners were tried and convicted reads as follows:

> "Whoever . . . uses any facility in interstate commerce with intent to . . . promote, manage, establish, carry on, or facilitate the promotion . . . of any unlawful activity and thereafter performs or attempts to perform any of the acts specified . . . shall be fined not more than $10,000 or imprisoned for not more than five years or both."

Petitioners contend that a proper construction and interpretation of the statute required the giving of an instruction which would have permitted the jury to consider evidence that any of the petitioners acted or failed to act because of ignorance of the law. In short, petitioners contend that the phrase "whoever uses . . ." must be interpreted to mean "Whoever intentionally or knowingly uses . . .".

There has been only one other reported case which has touched upon this question and which also involved the use of a Western Union ticker tape facility—*Turf Center Inc.* v. *U. S.*, CCA 10 (1963) 325 F. 2d 793.

In *Turf* the defendant asserted as error the refusal of the court to instruct the jury adequately on the question of specific intent. The Court of Appeals concluded that in view of the charge as a whole there was no error. In the report the trial court's instruction on the question is set out in a footnote on the question of intent. The instruction tendered by petitioners which the trial court refused is substantially identical with the instruction in *Turf*.

On the same day that Congress enacted Section 1952 it also enacted 18 U.S.C. 1084 and 18 U.S.C. 1953 which are reproduced herein as petitioners' Appendix E and Appendix F. Section 1084 forbids persons engaged in a

business enterprise involving gambling to use an interstate facility to transmit wagers. Section 1953 forbids the sending or carrying in interstate commerce of wagering paraphernalia. Section 1084 requires the use of the interstate facility to transmit wagers to be committed "knowingly". Section 1953 requires the sending or carrying of gambling paraphernalia to be committed "knowingly".

It is submitted that the only plausible explanation why the use of the interstate facility set forth in Section 1952 is not modified by the word knowingly is due to the variety of offenses enumerated in sub-section b of the act. If the use or travel was in connection with the crimes of extortion, bribery or arson the element of *scienter* as to the use or travel would be superfluous since the conduct which those crimes connote are common law felonies and require proof of a specific wrongful intent.

The applicable Indiana statute which petitioners concededly violated provides for a penalty ranging from a fine of $5 to $500 or imprisonment of ten days to six months, Burns Indiana Statutes, Vol. 4, Part 2, 10-2310 (Appendix G).

The statute under which petitioners were tried and convicted exposes them to maximum punishment of imprisonment for five years and a fine of $10,000 for the same conduct. The opinion of the Court of Appeals makes this result possible without requiring that the use of the interstate facility be a knowing, wilful or intentional use. As noted by Justice Jackson in *Morrissette*:

> "If one crime without intent has been smuggled into a section whose dominant offenses do require intent it was put in ill-fitting and comprising company." (*id* at p. 253 S.Ct. Report)

Both the District Court and the Court of Appeals analogized the cases at bar to violations of 18 U.S.C. 2311 (Dyer Act) and 18 U.S.C. 659 (National Stolen Property Act). These analogies are inappropriate. The Dyer Act is a federal statute directed against auto theft. The transportation of a stolen automobile in interstate commerce is the fortuitous circumstance which provides a base for federal jurisdiction. The same conduct is interdicted by the state law and the penalties are substantially the same, Burns Indiana Statutes, Vol. 4, Part 2, 10-3039. The same is true in the case of receiving stolen goods. The penalties under state and federal law are substantially the same and the conduct which each statute proscribes is essentially the same, Burns Indiana Statutes, Vol. 4, Part 2, 10-3039.

The thrust of Section 1952 is to prohibit the *use* of interstate facilities in aid of racketeering enterprises. The use of interstate facilities in and of itself is an innocent act. In order to punish persons such as petitioners who use interstate facilities for promoting a baseball pool, conduct which is a misdemeanor under state law, there must be read into the act a requirement of *scienter* as to the use. Since it is the use which Congress has interdicted, that use must be knowingly, wilfully or intentionally.

The existence of a *mens rea* is the rule of rather than the exception to the principles of Anglo-American jurisprudence, *Smith* v. *California*, (1959) 361 U.S. 147, 80 S.Ct. 215.

The recent trend in the interpretation of Federal criminal statutes is to discover by implication a requirement of *scienter* where there is no reason to suppose that the Congress by deliberate choice omitted such requirement, *Delaney* v. *U. S.*, CCA 1 (1952) 199 F. 2d 107.

Knowledge of the illegality of an act has been recognized as an essential element of the relevant *mens rea, Hall, Ignorance and Mistake in Criminal Law,* 33 Indiana Law Journal, 1, 29.

CONCLUSION

The opinion of the Court of Appeals is contrary to traditional concepts of due process in the administration of criminal justice. Reason and justice would seem to require that before these petitioners could be validly convicted of violation of this statute the Government should be required to prove a conscious knowledge of the obligation to refrain from doing the acts prohibited.

If Congress had enacted a statute which provided that whoever drove an automobile in excess of a certain speed limit on a Federal highway could be subjected to a fine of $10,000 and imprisonment for five years without requiring that the person so driving that automobile be aware of the existence of the Federal statute, it is submitted that this Court would either quickly strike down the statute as unconstitutional or read into the statute, as it did in *Morrissette,* the requirement of *scienter.*

Fundamental fairness dictates that before a person be held criminally responsible for his actions he should be aware of the consequences of the actions. It is not the province of Government and law enforcement officials to create legal traps for the unsuspecting and unwary.

A party might very well consciously elect to violate a state law which is a misdemeanor and face the consequences of his actions anticipating that at most his conduct will be punished by either a fine or a moderate term of imprisonment. In this sense the conduct of the petitioners

in the cases at bar is no different than the respectable motorist who deliberately decides to drive in excess of the speed limit.

These petitioners should not have conduct which merely amounts to a misdemeanor transformed and elevated into that of a felony without requiring knowledge on their part that they were violating a Federal statute. At the very least they should have been accorded the benefit of an instruction which would have permitted the jury to consider their asserted ignorance of the law in determining whether or not they had acted with the intent required.

Respectfully submitted,

MAX COHEN
Attorney for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT
For The Northern District Of Indiana
Hammond Division

UNITED STATES OF AMERICA	)	
vs.	)	Criminal No. 3662
FENTON LEON BASH and	)	
SAMUEL B. WOODS	)	

(Filed October 3, 1966)

Defendants, having been found guilty by a jury as charged in Counts I and III of the Indictment charging the use of an interstate facility in aid of unlawful gambling activity (Title 18 U.S.C. Sections 1952 and 2),[1] have filed motions in arrest of judgment and for new trial.

Defendants' primary contentions in their post trial motions are that Title 18 U.S.C. Section 1952 is unconstitutionally vague, indefinite, and ambiguous; and further that Title 18 U.S.C. Section 1952 has been unconstitutionally applied in this case because the Court interpreted the statute as not requiring the jury to find that the defendants had formed a specific intent to violate the statute. More specifically with regard to the second point, defendants contend that to sustain a conviction under Title 18 U.S.C. §1952, the government must prove that defendants knowingly intended to violate a Federal law and that the jury should have been permitted to consider defendants' asserted ignorance of their violation of a Federal statute in determining their guilt or innocence.

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[1] See Footnote "1", page 10.

Several other courts have previously passed upon defendants' general argument that Title 18 U.S.C. §1952 is unconstitutionally vague, and all have rejected this contention. See *U.S.* v. *Zizzo*, 338 F.2d 577 (7th Cir. 1964) cert. den. 381 U.S. 915; *Bass* v. *U.S.*, 324 F.2d 168 (8th Cir. 1963). The *Zizzo* and *Bass* cases involved travel in interstate commerce in aid of an unlawful gambling activity. The constitutionality of Title 18 U.S.C. §1952 has also been upheld in cases involving the use of an interstate facility in aid of unlawful gambling activities. *Turf Center Inc.* v. *U.S.*, 325 F.2d 793 (9th Cir. 1963); *U. S.* v. *Borgese*, 235 F.Supp. 286 (D.C. N.Y. 1964); *U. S.* v. *Smith*, 209 F. Supp. 907 (D.C. Wisc. 1962). The Court is in complete agreement with these cases which hold that although Section 1952 is admittedly broad, it is within the Constitutional power of Congress over interstate commerce and is not unconstitutional on the ground of vagueness.

Defendants' second contention, namely that a specific intent to violate the Federal law is a necessary element of an offense under Section 1952, has not yet been expressly ruled upon in any reported decision.[2] Defendants argue that the statutory language, in accordance with the principle that criminal statutes are to be strictly construed, requires a specific intent to violate the federal statute as an element of the offense. The relevant statutory language is as follows:

> "*Whoever* . . . uses any facility in interstate commerce . . . *with intent to* . . . promote, manage, establish, carry on or facilitate the promotion etc. of any unlawful activity and thereafter performs . . . shall be fined . . . (Emphasis added)

Defendants contend that the words "with intent" relate back to the words "whoever uses" and should be con-

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[2] See Footnote "2", page 11.

strued to require use of an interstate facility with an intent to violate this federal law so that ignorance of the federal violation might constitute a defense. The Court is of the opinion that defendants' contention in this regard is without merit. Although criminal statutes are to be strictly construed, this does not require this Court to ignore the dictates of common sense and to defeat the very purpose of the act by creating unwarranted exceptions to its operation. *Kordel* v. *U. S.*, 93 L.ed. 52, 56; 335 U.S. 345, 349 (1948). The words "with intent" obviously refer to the words immediately following, namely, "to promote . . . or facilitate the promotion . . . of any unlawful activity . . ." The term "unlawful activity" is defined in so far as relevant here as "any business enterprise involving gambling . . . in violation of the laws of the State in which . . . committed . . ." The criminal intent is the intent to promote or facilitate a gambling enterprise in violation of the laws of the State in question. In other words, the language of Title 18 U.S.C. §1952 requires a specific intent to promote or facilitate the violation of state law and not a specific intent to violate the federal law. A defense based upon ignorance that activities were in violation of state law could be relevant on the issue of intent to promote or facilitate an activity in violation of state laws, whereas an assertion of ignorance that the activities were in violation of the federal statute is irrelevant in the light of the statutory language. We conclude, therefore, that the words of the statute cannot be construed as requiring a specific intent to violate the federal statute nor does the statutory language make the defense of ignorance of the federal law available to the defendants.

The conclusion that the statutory language itself does not require a specific intent to violate the federal law does not, however, necessarily mean that such specific intent is not an element of the offense. The omission of any such express requirement in the statutory language still may not negate the requirement of specific intent under certain circumstances. For example, the Supreme Court has held that where an innocently passive person fails to register as a convicted felon as required by a city ordinance, because of ignorance of the existence of the ordinance and the registration requirement, a conviction of such a person is an unconstitutional application of the registration ordinance. *Lambert* v. *California,* 2 L.ed.2d 228 (195 . The case at bar is distinguishable for two reasons:

1. In *Lambert,* the accused had no criminal intent whatsoever and the statute required none, whereas in the case at bar defendants admitted they had knowingly violated the Indiana anti-gambling laws for years and the statute involved herein requires such knowledge and intent;

2. In *Lambert,* the accused was completely and innocently passive "unlike the commission of acts or the failure to act under circumstances that should alert the doer to the consequences of his deed."

In the case at bar, defendants were actively engaged in an unlawful gambling enterprise involving the use of facilities. For these reasons, *Lambert* supports the conclusion we have reached.

The Supreme Court has also held that Congressional silence with reference to intent may not dispense with the requirement if the statute contains well defined traditional

common law terms such as larceny or embezzlement. The Court stated as follows:

> "Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in the statute. Congressional silence as to mental elements in the Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the States may warrant quite contrary inferences than the same silence in creating an offense new to the general Law, for whose definition the Courts have no guidance except the Act . . .
>
> . . . and where Congress borrows terms of Act in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . ." *Morrissette* v. *U. S.*, 96 L.ed 289, 299, 300 (1952)

The state involved in the present case is not silent as to intent, since it requires an intent to promote or facilitate the promotion of gambling activities in violation of local law. The statute is silent, however, with reference to an intent to violate the federal law by the use of an interstate facility, since the statute states only that "Whoever . . . uses any facility with intent to . . . shall be fined . . .". Defendants argue that the statute should be construed as if it read "whoever knowingly uses" or "whoever intentionally uses" thus requiring knowledge that the facility was in interstate commerce and an intent to violate the federal statute. We hold that the Congressional failure to expressly require knowledge of the interstate character of the facility or an intent to violate

the federal statute means that the offense does not involve these elements. This conclusion is not in conflict with the *Morrissette* doctrine because the use of a facility in interstate commerce has no traditional common law elements of specific intent or knowledge. Furthermore, *Morrissette* involved total Congressional silence with reference to intent whereas Section 1952 expressly provides that an intent to promote or facilitate unlawful gambling activities is an element of the offense. If a different or additional intent was contemplated, Congress would have so provided.

The above conclusion is further supported by virtue of the passage of a related statute[3] (Title 18 U.S.C. §1084) on the same date concerning the transmission of wagering information. Although Sections 1084 and 1952 have similar purposes, namely to reach organized, syndicated unlawful gambling activities[4], each involves a different offense with different elements of proof and different penalties. *U. S.* v. *Smith, supra, U. S.* v. *Borgese, supra.* In Section 1084, Congress expressly provided as follows: "Whoever being engaged in the business of betting or wagering *knowingly* uses a wire communication facility . . .". This language differs significantly from that of Section 1952 which is phrased, "whoever . . . uses any facility. . . with intent . . .". Even if no plausible reason for the differing language on this issue existed, this Court would be hesitant to assume that the word "knowingly" was omitted from Section 1952 as a result of an oversight. However, we feel that the difference in the language employed was intentional and is based upon significant differences in the

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[3] See Footnote "3", page 11.

[4] See Footnote "4", page 11.

conduct prohibited by each statute. Under Section 1084, an element of the offense is the engaging in the business of betting or wagering, but this business need not be unlawful in the state where it is carried on. Rather, the transmission of wagering information on a sporting event either from or to a state where betting on that event is illegal is prohibited. Accordingly, even though a gambling enterprise may be legal in the state of transmission, one who is engaged in such an enterprise and who transmits wagering information concerning a sporting event into a state which prohibits wagering on that sporting event violates Section 1084. Since the local gambling activity need not be illegal for a violation of Section 1084, Congress has expressly provided that the use of a wire facility for the transmission in interstate or foreign commerce be done "knowingly". On the other hand, Section 1952 involves the use of a facility in interstate commerce with intent to promote an unlawful gambling activity. Since Section 1952 requires the specific intent to promote an unlawful gambling activity, no danger exists that innocently ignorant or passive conduct will be punished as conceivably could occur under Section 1084 had the word "knowingly" been omitted. We conclude, therefore, that Congress has been alert and explicit as to the mental elements required under both Section 1084 and Section 1952. *Morrissette* v. *U. S., supra,* 96 L.ed. 288, 301.

Perhaps the most illuminating precedents with reference to the problem at bar concerning the mental element under Section 1952 is the use of an interstate facility are those cases involving the transportation and receipt of stolen property moving in interstate commerce. Courts have held that the Dyer Act (Title 18 U.S.C. §2311 et seq.) is violated when one receives a stolen automobile with knowledge of its theft even if he is unaware that it has

been transported in interstate commerce. *Pilgrim* v. *U. S.*, 266 F.2d 486 (5th Cir. 1959) *Brubaker* v. *U. S.*, 183 F.2d 894 (6th Cir. 1950). Likewise, it is not necessary for the government to show that the accused knew goods were to be transported in interstate commerce to sustain a conviction for transportation in interstate commerce of goods knowing them to have been stolen. *U. S.* v. *Kierschke*, 315 F.2d 315 (6th Cir. 1963); *U. S.* v. *Tanuzzo*, 174 F.2d 177, (2nd Cir. 1949) cert. den. 338 U.S. 815. The statutory provisions in the above cases are analogous to the provisions of Section 1952. Very pertinent to the issue under consideration in the case at bar are the following excerpts from two cases from the Sixth Circuit Court of Appeals:

> "It is insisted by respondents that in order to justify their conviction it must appear, not only that they knew the automobile had been stolen, but that they knew of the interstate transportation. The trial court took the other view, and charged that knowledge that the automobile had been stolen was enough. In this the Court was right. As far as this point is concerned, the case cannot be distinguished from our decision in *Kasle* v. *U. S.*, 233 Fed. 878. *The statute does not require that persons otherwise guilty thereunder should escape because they supposed that they were violating only a state and not a federal law.*" *Katz* v. *U. S.*, 281 Fed. 129 (6th Cir. 1922)

The Court in *Kasle*, stated as follows:

> "As we interpret the statute such an allegation is not necessary. One who knowingly receives stolen chattels must do so at the peril of their having been stolen while in course of interstate transportation; indeed it is not perceived why the thief should escape conviction under this statute just because he did not know the points of origin and destination. Manifestly both the receiver and the thief are chargeable

with knowledge of the Act of Congress forbidding this particular theft, quite as certainly as they are of a state statute prohibiting theft generally. The status of the articles, in the sense of being interstate or intrastate in character cannot in the nature of things affect the fact either of the stealing or receiving alleged; and the statute, whether federal or state, is at bottom aimed against stealing or receiving. The most then than can be said of the object of allegation, as well as proof, touching the interstate character of the articles is to show the existence of the condition which brought the subject within the federal power and jurisdiction."

The views expressed in these case were followed in *Donaldson* v. *U. S.*, 82 F.2d 680 (7th Cir. 1939) and *Loftus* v. *U. S.*, 46 F.2d 841 (7th Cir. 1931). We hold that the use of a facility in interstate commerce is a necessary jurisdictional element of an offense under Title 18 U.S.C. §1952 but that no specific mental element or specific intent beyond the ordinary general criminal intent need be shown with reference to such use.

Defendants also argue that the verdicts are unsupported by substantial evidence and are contrary to the manifest weight of the evidence. This contention is without merit since ample evidence was before the jury concerning defendants' carrying on of an unlawful gambling enterprise and the use of the wire ticker tape facility which defendants had installed to promote and facilitate the carrying on of gambling activity they knew to be unlawful by the posting of scores from the machine to a blackboard on the premises. Accordingly, the findings of guilty are sustained by the evidence. Title 18 U.S.C. Sections 1952 and 2. The Court has also considered the other points raised by the defendants and finds them to be equally without merit.

FOOTNOTES

[1] Title 18 U.S.C. Section 1952 provides:

"Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the state in which they are committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, Sec. 1(a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68 July 7, 1965, 79 Stat. 212."

[2] *Turf Center Inc.* v. *U. S.*, 325 F.2d 793 (9th Cir. 1964). The Court upheld an instruction on intent which appears to state, in substance, that the vital intent is the intent to promote etc. a business enterprise involving a gambling offense in violation of state laws, and that "ignorance of the law" could be considered by the jury in determining whether or not the accused "acted or failed to act with specific intent as charged." The Court made no express holding as to whether or not specific intent is an element under Section 1952, and if so, whether the specific intent must be to violate a federal law or whether such specific intent must exist with reference only to the promotion and facilitation of the unlawful gambling activity.

[3] Title 18 U.S.C. Section 1084 provides in relevant part as follows:

"Transmission of wagering information; penalties.

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000.00 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a state where betting on that sporting event or contest is legal into a state in which such betting is legal."

[4] See 1961 U.S. Code Congressional and Administrative News, pages 2631 and 2664.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM 1966 — APRIL SESSION 1967

Nos. 15934, 15935

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15934 v.

RICHARD MILLER,
Defendant-Appellant.

and

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 15935 v.

FENTON LEON BASH and
SAMUEL WOODS,
Defendants-Appellant.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

June 9, 1967

Before SCHNACKENBERG, KNOCH and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* These companion cases were tried ten days apart by the same District Judge, with the

same counsel representing the three defendants. Both cases involve the construction of 18 USC § 1952, which was added to the Criminal Code in 1961 as a part of the Attorney General's program to combat gambling, narcotics, prostitution, liquor and other offenses.

The common question in these cases is whether Section 1962 requires an intent to violate federal law by using any facility in interstate commerce. The District Court held that no such intent was required, and we agree.

In the first of the two cases, Richard Miller operated the Miller Recreation Parlor in Gary, Indiana. His premises consisted of a poolroom, barber and tobacco shop. Miller operated a baseball gambling pool there. The pool was concededly illegal under Indiana law. His patrons purchased baseball tickets. Game scores were obtained from a Western Union tickertape and posted on a blackboard. Miller would use the tickertape to determine baseball pool winners on days when the games were all completed in the afternoon. As part of his duties, Miller's porter would post scores from the tickertape on the blackboard. The baseball information contained on the Western Union tickertape was transmitted from Chicago to Gary, Indiana. Miller paid federal wagering taxes. Because of his admissions that the tickertape was used on occasion to determine payoffs, he does not question the sufficiency of the evidence to show his guilt.

In the second case, defendants Fenton Bash and Samuel Woods contend that there was no substantial evidence to show their guilt. This point was raised by their motion for a new trial. In denying that motion, the District Court ruled that there was "ample evidence • • • before the jury concerning defendants' carrying on of

an unlawful gambling enterprise and the use of the wire ticker tape facility which defendants had installed to promote and facilitate the carrying on of gambling activity they knew to be unlawful by the posting of scores from the machine to a blackboard on the premises" (258 F.Supp. at pp. 812-813).

In the case involving Bash and Woods, the evidence shows that Bash owned and Woods operated the Club Poolroom (also known as the Club Lunch) in Gary, Indiana. As in the Miller case, a baseball pool was operated on the premises in known violation of Indiana law. The customers used the Western Union tickertape there to post baseball scores on blackboards. Ralph ("Rum") Weinert also posted the tickertape results on the blackboards. Defendants' clerk Joseph Ortman slipped Weinert money "to get something to eat" in return for Weinert's casual work behind the cigar counter. As in the Miller case, the information transmitted by the Western Union tickertape originated in Chicago, and the federal wagering taxes were paid. Bash told an FBI agent that he used this machine "as a convenience in computing the end-of-game scores". Woods made similar admissions.

Although there was no evidence that Miller or Bash personally posted scores obtained from the tickertape, the machine was used in their establishment to tabulate baseball scores to compute winning tickets. The applicability of the statute does not depend on whether a defendant personally operates the tickertape in conjunction with an illegal baseball pool. The key word of the statute is "uses", one of the most comprehensive words in our language. 91 C.J.S. 513, 518-519. This verb is defined in Webster's Third New International Dictionary as "to carry out a purpose or action by means of: make instru-

mental to an end or process: apply to advantage: turn to account * * *". Synonyms are "employ, utilize, apply, avail". (*Idem*, p. 2524.) This word is to be given its ordinary meaning (*Swalley* v. *Addressograph Multigraph Corporation*, 158 F.2d 51, 54 (7th Cir. 1946), certiorari denied, 330 U.S. 845; *Great American Indemnity Co.* v. *Saltzman*, 213 F.2d 743, 746-747 (8th Cir. 1954), certiorari denied, 348 U.S. 862) and is sufficiently broad to encompass defendants' operations. As proprietor and operator, respectively, of this business, the defendants were responsible for the installation and presence of the ticker on their premises. They wanted the ticker in their establishment so that their customers could check the scores. They provided blackboards so that scores obtained from the ticker could be posted. They knew that these scores would be of interest to their baseball pool customers. With defendants' knowledge and approval, their customers promoted the pool by posting the scores obtained from the tickertape. These activities constituted a "use" of an interstate facility by defendants.

Even if the term "use" were not sufficiently broad to include Bash's and Woods' activities, Section 2(b) of the Criminal Code,[1] which was included in the indictment, makes them liable as principals. Defendants Bash and Woods knew that their patrons were posting scores on the blackboards from information supplied by the tickertape. Thus through the use of an interstate facility the customers facilitated the carrying on of this business enterprise involving gambling violative of Indiana law. Because Woods and Bash consented to and condoned

[1] That Section provides: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such" (18 USC § 2 (b)).

these illegal activities, they are punishable as principals. *United States* v. *Leggett,* 269 F.2d 35, 37 (7th Cir. 1959), certiorari denied, 361 U.S. 901; *United States* v. *Inciso,* 292 F.2d 374, 378 (7th Cir. 1961), certiorari denied, 368 U.S. 920; *United States* v. *Zizzo,* 338 F.2d 577, 580 (7th Cir. 1964), certiorari denied, 381 U.S. 915. On appeal defendants have not challenged the applicability of Section 2(b) or assailed the instructions thereunder.

Defendants in the second case also apparently argue that the ticker did not facilitate gambling. Bash and Woods told FBI Agent Cox that the results of the ticker-tape machine were used to tabulate end-of-game scores, and for the purpose of paying off the baseball bets. It is true that the baseball pool could have been operated without the ticker, but nevertheless the ticker was maintained to obtain results as quickly as possible for the gambling customers. Section 1952 does not require that the ticker be essential to the gambling operation; it need only "facilitate" the carrying on of the illegal gambling. As used in this statute, "facilitate" means "to make easy or less difficult". *United States* v. *Barrow,* 212 F.Supp. 837, 840 (E.D. Pa. 1962). The testimony of FBI Agents Cox and Hagan amply supports the jury's finding that defendants facilitated the carrying on of this gambling operation by keeping the ticker on their premises.

We next come to the question common to both cases, namely, whether the use of an interstate facility must be with intent to violate the Federal law and, concomitantly, whether ignorance of the Federal law should be considered by the jury in determining defendants' intent. Specifically, defendants argue that under Section 1952 an interstate facility must be used knowingly, willfully or intentionally. In resolving this question, reference of course

must first be made to the statute itself. In pertinent part, Section 1952 of the Criminal Code (18 USC § 1952) provides as follows:

> (a) Whoever * * * uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> * * * shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed * * *.

From the wording of this statute, it is apparent that Congress did not require any *mens rea* with respect to the use of an interstate facility. In relevant part, Congress only required that there be intent to facilitate the carrying on of any business enterprise involving gambling in violation of state laws. If Congress had intended to require specific intent with respect to the use of the interstate facility, the phrase "with intent to" or its equivalent would have been juxtaposed to modify "uses" in Section 1952(a).

Even though "intent" as employed in Section 1952 here refers to a violation of State laws, all three defendants assert that the Government was also required to prove that the defendants intentionally, knowingly or willfully used an interstate facility. They insist that the jury should have been instructed that ignorance on their part that they were violating a Federal law was a relevant

factor in determining whether they were guilty. In a well-reasoned opinion, the District Judge rejected this construction of Section 1952. We approve his conclusion that "the use of a facility in interstate commerce is a necessary jurisdictional element of an offense under Title 18 USC § 1952 but that no specific mental element or specific intent * * * need be shown with reference to such use" (258 F.Supp. at p. 812). Similarly, in *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 797 (9th Cir. 1963), the District Court instructed the jury that Section 1952 only requires intent to violate State law, and the Ninth Circuit approved the instruction without also requiring an intent to violate the Federal law.

The judgment of the District Court is supported by analogous cases involving the receipt of stolen goods or automobiles that have been transported in interstate commerce. The decisions under the National Stolen Property Act (18 USC § 2314) and Dyer Act (18 USC § 2311) establish that convictions thereunder are justified even though defendants did not know of the interstate transportation. See, *e.g., United States* v. *Kierschke,* 315 F.2d 315, 317 (6th Cir. 1963); *Pilgrim* v. *United States,* 266 F.2d 486, 488 (5th Cir. 1959); *Donaldson* v. *United States,* 82 F.2d 680, 681 (7th Cir. 1936). Those authorities convince us that persons otherwise guilty under Section 1952 cannot escape its purview because they intended only to violate State law. Here the Government need only show that there was the use of an interstate facility to satisfy the jurisdictional element of this offense; the commission of the balance of the offense, here gambling forbidden by State law, was conceded in both cases before us. It is undenied that defendants knew that the tickers were interstate facilities and knowingly retained them in their

establishments. Such knowledge suffices to satisfy the jurisdictional portion of this statute. See *United States* v. *Zizzo,* 338 F.2d 577, 580 (7th Cir. 1964), certiorari denied, 381 U.S. 915; *United States* v. *Hawthorne,* 356 F.2d 740, 742 (4th Cir. 1966), certiorari denied, 384 U.S. 908.

As to defendants' professed ignorance of this Federal law, it is noteworthy that the Model Penal Code provides that knowledge of illegality is not ordinarily an element of an offense except where the statute expressly so provides. See American Law Institute Model Penal Code, Tentative Draft No. 4 (1955) Section 2.02(9) and Comments, pp. 130-131; see also *Lambert* v. *California,* 355 U.S. 225, 228; *United States* v. *Gris,* 247 F.2d 860, 864 (2d Cir. 1957); *United States* v. *Mansavage,* 178 F.2d 812, 817 (7th Cir. 1949), certiorari denied, 339 U.S. 931. This statute of course does not fit the exception, for as to Federal law, it does not "expressly so provide". As to State law, the defendants all knew they were violating Indiana gambling laws. Section 1952 requires no more.

In support of their position, defendants rely principally on *Morisette* v. *United States,* 342 U.S. 246, and *Lambert* v. *California,* 355 U.S. 225. In *Morisette,* the Supreme Court was not dealing with a bifurcated statute like Section 1952. *Morisette* involved a statute punishing embezzlement, stealing, purloining or knowing conversion of Government property. The Court interpreted the statute as requiring criminal intent, for Congress was adopting a concept of crime already well-defined in common law. At the same time, the Court recognized that intent would not be required with respect to offenses not incorporated from the common law. See 342 U.S. at p. 262. Accordingly, at the most *Morisette* requires intent with respect only to the second portion of Section 1952. Whereas the *Morisette*

statute (as construed by the trial court) did not require intent, the second portion of Section 1952 requires intent to facilitate unlawful gambling activities.

Lambert v. *California*, 355 U.S. 225, involved a Los Angeles ordinance making it an offense for a person convicted of a crime punishable in California as a felony to remain in Los Angeles for more than five days without registering with the chief of police. The Court held that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary for a valid conviction. In holding that knowledge was an element of the offense, the Court emphasized that the ordinance dealt with wholly passive conduct. At the same time, the Court observed that a legislature need not include knowledge in a definition of an offense involving "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed". See 355 U.S. at p. 328. In *Lambert*, the ordinance required no criminal intent and the defendant had none. Here the statute requires that defendants intended to violate the Indiana gambling laws, and they admittedly knowingly violated those laws for years.

Defendants also rely upon *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952), involving Section 4047(e)(8) of the Internal Revenue Code of 1939 (now, with irrelevant changes, 26 USC § 7214(a)(7)).[2] That provision was akin to a common law crime of the type involved in the *Morisette* case, so that the *Delaney* trial judge charged

[2] That provision of the Internal Revenue Code of 1939 provided fines and imprisonment for anyone "Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate or return."

the jury that in order to convict the defendant, they must find not only that the recitals in the cerficate were false, but also that the defendant knew them to be false. The Court of Appeals did not decide whether the statute required scienter. *Delaney* is inapplicable for the same reasons as *Morisette* is inapplicable. Furthermore, Section 1952 here requires intent to violate State law and both juries were so instructed by the District Court. In rendering guilty verdicts, they necessarily found the only requisite intent.

In sentencing these defendants, the District Judge was sympathetic to federal jurisdiction to prosecute open and notorious gambling activities that the Indiana authorities had tolerated for too long. The legislative history of the statute shows, *inter alia,* that it was meant to condemn the use of an interstate facility *and* local gambling activities facilitated by the use of the interstate facility. See House Report No. 966, 2 U.S. Code, Congressional and Administrative News, 87th Cong., 1st Sess. (1961) at p. 2665. Congress fully intended this statute to apply to local gambling, for it "decided that the facilities of interstate commerce become tainted when they are used by persons with evil motives and who perform evil acts". *United States* v. *Barrow,* 212 F.Supp. 837, 842 (E.D.Pa. 1962). Federal assistance was being proffered by Congress where local law enforcement had failed.

We are satisfied that there was sufficient evidence to sustain the Bash and Woods verdict and that the District Court construed the statute correctly. Therefore, the judgments are affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, July 21, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 15934, 15935 vs.
RICHARD MILLER,
FENTON LEON BUSH and SAMUEL B. WOODS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the petition for a rehearing en banc of this cause be, and the same is hereby, Denied.

APPENDIX D

18 U.S.C. 1952

INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this action "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

APPENDIX E

18 U.S.C 1084

TRANSMISSION OF WAGERING INFORMATION

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisonment not more than two years, or both.

APPENDIX F

18 U.S.C. 1953

INTERSTATE TRANSPORTATION OF WAGERING PARAPHERNALIA

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,0000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

APPENDIX G

BURNS INDIANA STATUTES, VOLUME 4, PART 2, 10-2310
KEEPING ROOM FOR POOL SELLING

Any person who shall keep any room or building or any portion of any room or building, or occupy any place or public or private grounds anywhere within the state with apparatus, books or other device for the purpose of recording or registering bets or wagers or of selling pools, and any person who shall record or register bets or wagers or sells pools upon the result of any trial or contest or skill, speed, or power of endurance of man or beast, or, being the owner, lessee or occupant of any such rooms, building, part or portion thereof, shall knowingly permit the same to be used or occupied for any of the purposes aforesaid, or shall therein keep, exhibit or employ any device or apparatus for the purpose of registering or recording such bets or wagers or for the selling of such pools, or shall become the custodian or depository for hire or reward of any money, property or other thing of value staked, wagered or pledged, as aforesaid, upon any such results, shall, on conviction, be fined not less than five dollars ($5.00) nor more than five hundred dollars ($500), or imprisoned in the county jail for not less than ten (10) days nor more than six (6) months, or both.

APPENDIX H

INSTRUCTION GIVEN BY THE TRIAL COURT

I further instruct you that this element of specific intent, as applied in this case, relates only to the carrying on of a gambling activity in violation of the laws of Indiana. The Government has the burden of proving, beyond a reasonable doubt, that defendants knowingly and wilfully carried on such gambling activities with specific intent to violate the laws of Indiana. The Government is not required to prove that defendants specifically intended to violate a Federal law.

This matter of intent has been discussed at some length and is a little tricky, and maybe I can illustrate to you what I think we mean.

Let us suppose that a narcotics peddler in Hammond, Indiana receives a letter through the mail, posted in Chicago and received at the Post Office in Hammond, Indiana, and the letter says, "Meet Joe in front of the Federal Building in Hammond on Friday night at 8:30." On Friday night at 8:30, having received this information in interstate commerce, and the mail is an interstate facility here, the peddler goes to State Street in front of the Federal Building with the intent and purpose of selling narcotics to Joe.

The meeting of Joe is based upon the letter, the information contained in the letter, which is the interstate facility.

The intent to violate the law was the intent to violate the Indiana law against the sale of narcotics, which he went to meet Joe to do.

I hope this makes it somewhat clear by this illustration as to what intent is. It must be the use of the information received in an interstate facility of the purpose, or with the intent to violate a State law.

APPENDIX I

DEFENDANTS' INSTRUCTION NO. 8

The defendants have offered evidence that they did not know that their conduct was unlawful. Unless outweighed by evidence to the contrary, the law presumes that every person knows what the law forbids and what the law require, to be done. Intent is an element of the crime charged in this indictment. Therefore, the evidence that defendants acted or failed to act because of ignorance of the law is to be considered in determining whether or not the defendants acted or failed to act with the required intent.